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No. 08-1259

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

TOBIAS WEISS
Counsel of Record
LAW OFFICE OF TOBIAS WEISS, ESQ.
1766 Bedford Street
Stamford, Connecticut 06905
(203) 348-6196

Petitioner Pro Se and Attorney for Petitioner Gertrude O. Weiss

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

This petition for reconsideration is submitted pursuant to Supreme Court Rule 44(2), on the following grounds:

I. EL AL, AS A FOREIGN AIR CARRIER, DOES NOT HAVE THE BENEFIT OF THE PREEMPTION STATUTE, 49 U.S.C. § 41713(b)(1).

El Al is a foreign air carrier. There is no dispute of that fact.

The plain language of the statutory definitions and the preemption clause clearly excludes all foreign air carriers from the benefits of the preemption provision of the Airline Deregulation Act ("ADA") of 1978, as amended. Specifically, Congress expressly defines "air carrier" and "foreign air carrier" as mutually exclusive terms:

In U.S.C. § 40102(a)(2), "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. In 49 U.S.C. § 40102(a)(21), "foreign air carrier" means a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.

The ADA's express preemption provision, 49 U.S.C. § 41713(b)(1), states:

> . . . a State . . . may not enact or enforce a law, regulation, or other provision having the force or effect of law [1] related to a price route, or service [2] of an air carrier [3] that may provide

> air transportation under this subpart. [Numbers in brackets supplied]

The plain meaning of Clause 3 is to limit the benefit of preemption solely to those "air carriers" (that is, United States citizens) who are legally authorized to provide air transportation.

Hence, under the plain language of the statutory definitions, "air carrier" and "foreign air carrier" are mutually exclusive terms. An "air carrier" must be a United States citizen. A "foreign air carrier" must not be a United States citizen. As defined in the statute, a "foreign air carrier" cannot be an "air carrier", and vice versa. Only an "air carrier" may invoke the preemption affirmative defense. In sum, Congress explicitly excluded "foreign air carriers" from the benefits of the ADA's preemption provision in §41713(b)(1).

II. WITHOUT THE APPLICATION OF THE PREEMPTION STATUTE, THERE IS NO BASIS FOR DISMISSING THE SECOND COUNT OF THE COMPLAINT, AS WAS DONE BY THE COURT BELOW.

The only basis given for dismissing the second count of the complaint, the tort count, is the foregoing statute.

We are not discussing the substantive merits of the second count, even thought it is a permissible basis for recovery under New York Law, since that is a matter for the trial court.

We submit that the claimed statute does not apply here according to its express terms, and respectfully request that this court reconsider the denial of

review here, and permit us to proceed against this foreign air carrier under the tort count.

CONCLUSION

The preemption statute does not apply in this case.

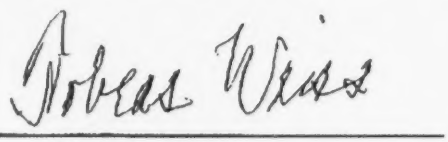
Respectfully submitted,

TOBIAS WEISS
Counsel of Record
1766 Bedford Street
Stamford, Connecticut 06905
(203) 348-6196

Petitioner Pro Se and for Petitioner Gertrude O. Weiss

CERTIFICATE

This is to certify that this petition is presented in good faith and not for delay.



Tobias Weiss